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No. 06-1646

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GINO GONZAGA RODRIQUEZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2000 & Supp. IV 2004), provides a 15-year minimum sentence for a person convicted of possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1), if the person has three prior convictions for, *inter alia*, state drug-trafficking offenses "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). The question presented is as follows:

Whether a state drug-trafficking offense, for which the maximum term of imprisonment for repeat offenders was ten years, qualifies as a predicate offense for such offenders under 18 U.S.C. 924(e)(2)(A)(ii).

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 255-271) is reported at 464 F.3d 1072. The sentencing order of the district court (J.A. 245-254) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2006. A petition for rehearing was denied on January 12, 2007 (J.A. 272-273). On March 29, 2007, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 12, 2007; on May 2, 2007, Justice Kennedy further extended the time to and including June 11, 2007. The petition was filed on that date and granted on September 25, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2000 & Supp. IV 2004), is reprinted in an appendix to this brief. App., *infra*, 1a-2a. Relevant provisions of Washington law are reprinted at J.A. 274-286.

STATEMENT

This case presents a question of statutory interpretation involving the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (2000 & Supp. IV 2004), which was enacted to assist the States in addressing the threat to public safety posed by career criminals. *Taylor* v. *United States*, 495 U.S. 575, 581 (1990). As amended, the ACCA provides a 15-year minimum sentence for a person convicted of possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1), if the person has three prior convictions for "violent felon[ies]" or "serious drug offense[s]." A "serious drug offense" is defined as, *inter alia*, a state drug-trafficking offense "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). The question presented is whether a state drug-trafficking offense qualifies as a "serious drug offense" for repeat offenders where the maximum term of imprisonment for such offenders was ten years.

Following a jury trial, respondent was convicted of possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1). At sentencing, the government sought application of the ACCA. Although the government introduced proof that respondent had two convictions in California for burglary and three convictions in Washington State for delivery of a controlled substance, the district court declined to apply the ACCA. The court reasoned that respondent's Washington convic-

tions did not qualify as convictions for "serious drug offense[s]" because the maximum term of imprisonment *for first-time offenders* was only five years. J.A. 245-254. The district court sentenced respondent to 92 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. J.A. 255-271.

1. In 1998, after serving time for various drug-trafficking convictions in Washington State, respondent was placed on a term of supervised release. Respondent subsequently absconded; he was convicted, *in absentia*, of escaping from custody, and warrants were issued for his arrest. On April 1, 2003, a fugitive task force located and arrested respondent at an apartment in Spokane, Washington, where he was apparently residing. During a subsequent search of the apartment, officers discovered a .40-caliber semi-automatic handgun and ammunition hidden beneath a couch. A friend of respondent's later testified that he had given respondent the gun so that respondent could "get rid" of it. Respondent admitted that he was aware that he was not supposed to possess a gun. Officers also found a bag of heroin and approximately $900 in cash on respondent's person, and more heroin, methamphetamine, and other drug paraphernalia in a room that respondent was apparently using as his bedroom. J.A. 256-258; Gov't C.A. Br. 5-12; PSR ¶ 89.

2. A grand jury in the Eastern District of Washington returned a one-count indictment charging respondent with possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1). J.A. 151-152. The indictment also cited the ACCA. J.A. 151. A jury found respondent guilty.

At sentencing, the government argued that, although respondent would ordinarily be subject to a maximum sentence of ten years of imprisonment for possessing a firearm as a convicted felon, see 18 U.S.C. 924(a)(2), respondent qualified as an armed career criminal under the ACCA (and was therefore subject to a minimum sentence of 15 years), see 18 U.S.C. 924(e)(1). As is relevant here, before his arrest in this case, respondent had two convictions for residential burglary under California law (in 1980 and 1982) and three convictions for delivery of a controlled substance under Washington law (all in 1995). J.A. 41-42, 247-250; PSR ¶¶ 42-44, 64-80, 84-86.[1]

For purposes of applying the ACCA (which requires three qualifying convictions for predicate offenses), the critical question was whether any of respondent's three convictions for delivery of a controlled substance under Washington law would qualify as a conviction for a "serious drug offense": *i.e.*, a state drug-trafficking offense "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii).[2] Each of respondent's convictions was for the violation of a Washington statute that prohibits the manufacture, delivery, or possession of a controlled

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[1] Among other convictions, respondent also had a 1980 California conviction for grand theft, a 1984 California conviction for possession of fraudulent checks, a 1985 California conviction for assault with a deadly weapon, a 1986 California conviction for being under the influence of controlled substances, a 1991 Washington conviction for assault, and the 1998 Washington conviction for escape from custody. PSR ¶¶ 38-41, 45-63, 81-83, 87-89.

[2] Although those convictions were entered on the same date, they constitute discrete convictions for ACCA purposes, because they were for offenses "committed on occasions different from one another." 18 U.S.C. 924(e)(1); see J.A. 14, 40, 91.

substance with intent to manufacture or deliver. Pet. App. 10a; see Wash. Rev. Code § 69.50.401 (1994). In each case, respondent pleaded guilty to delivery of a controlled substance from "Schedule III-V." J.A. 14, 40, 91; see Wash. Rev. Code § 69.50.401(a)(1)(ii)-(iv) (1994).[3]

Under Washington law, the maximum sentence for the delivery of a Schedule III, IV, or V controlled substance is five years for first-time offenders. See Wash. Rev. Code § 69.50.401(a)(1)(ii)-(iv) (1994).[4] For repeat offenders, however, the maximum sentence for that offense is ten years, under a statute providing that the maximum sentence for "[a]ny person convicted of a second or subsequent [drug] offense" is double the maximum for a first-time offender. *Id.* § 69.50.408(a). For purposes of that statute, an offense is "considered a second or subsequent offense, if, prior to his or her conviction of the offense, the offender has at any time been convicted under * * * any statute of the United States

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[3] The underlying conduct in each case involved heroin, which is a Schedule I narcotic under Washington law. See Wash. Rev. Code § 69.50.101(r)(1) (1994). If respondent had pleaded guilty to delivery of a Schedule I narcotic, he would have been subject to a statutory maximum sentence of at least ten years, regardless of whether he was a recidivist. See *id.* § 69.50.401(a)(1)(i). Respondent, however, pleaded guilty in each case only to the lesser charge of delivery of a controlled substance from "Schedule III-V." In each case, apparently as part of a plea agreement, the charging document was amended to delete any reference to "heroin." Compare J.A. 34, 62-64, 112, with J.A. 33, 59-60, 110.

[4] The statute has since been amended to clarify that, for first-time offenders, delivery of a Schedule III, IV, or V controlled substance is a Class C felony—which, under Washington law, is punishable by a maximum sentence of five years. See Wash. Rev. Code §§ 9A.20.021(1)(c), 69.50.401(2)(c)-(e) (2004). In all other material respects, the relevant statutes remain the same.

or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs." *Id.* § 69.50.408(b). The judgments for each of respondent's convictions indicated that he was subject to a maximum sentence of ten years. J.A. 16, 42, 93; see PSR ¶¶ 51-53.

The federal presentence report (PSR) determined that respondent qualified as an armed career criminal under the ACCA, based on one of the two California convictions for residential burglary and the three Washington convictions for delivery of a controlled substance. PSR ¶¶ 33, 94, 120, 122. The PSR also determined that, based on a total offense level of 33 (increased because of the applicability of the ACCA, see United States Sentencing Guidelines § 4B1.4) and a criminal history category of VI, respondent's Guidelines sentencing range was 235 to 293 months of imprisonment. PSR ¶ 121.

At the sentencing hearing, the government contended that respondent qualified as an armed career criminal under the ACCA, based on both of the California burglary convictions and the three Washington drug-trafficking convictions. J.A. 160, 162-163.[5] Without objection, the government introduced certified copies of the judgments and other relevant documents pertaining to those convictions. J.A. 179-180; see J.A. 13-150.

3. The district court held that the ACCA was inapplicable. J.A. 245-254. As a preliminary matter, the court agreed with the government that both of respondent's California burglary convictions qualified as convictions for "burglar[ies]," and therefore "violent felon[ies]," under the ACCA. J.A. 247-249; see *Shepard* v. *United States*, 544 U.S. 13, 26 (2005); *Taylor*, 495 U.S. at

[5] The government did not become aware of respondent's 1980 California burglary conviction until after the presentence report was drafted. See J.A. 162-163.

602. Relying on the Ninth Circuit's decision in *United States* v. *Corona-Sanchez*, 291 F.3d 1201 (2002) (en banc), however, the district court held that the Washington drug-trafficking convictions did not qualify as convictions for "serious drug offense[s]," on the ground that the "maximum term of imprisonment" for those offenses had to be determined without reference to the sentencing provision applicable to repeat offenders. J.A. 250-254.

In *Corona-Sanchez*, the defendant had pleaded guilty to being found in the United States after deportation, in violation of 8 U.S.C. 1326(a). 291 F.3d at 1202. The question presented in that case was whether a California petty theft offense constituted an "aggravated felony" under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, which would have increased the defendant's base offense level under Guidelines § 2L1.2(b)(1)(A). See *Corona-Sanchez*, 291 F.3d at 1202, 1203, 1208-1211. The answer to that question turned on whether the petty theft offense was "a theft offense * * * for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(G). While the maximum sentence for petty theft under California law was six months for first-time offenders, the defendant was sentenced to two years under a sentencing provision applicable to repeat offenders. *Corona-Sanchez*, 291 F.3d at 1208.

The Ninth Circuit held that, notwithstanding the fact that the defendant actually received a two-year sentence, the "term of imprisonment" for purposes of the INA's definition of "aggravated felony" (and thus the applicable Guideline) was six months, the maximum term that the defendant could have received if he were a first-time offender. *Corona-Sanchez*, 291 F.3d at

1208-1209. The court of appeals reasoned that, under *Taylor*, sentencing courts were required to "examine the prior crimes by considering the statutory definition of the crimes categorically, without reference to the particular facts underlying those convictions." *Ibid.* (internal quotation marks and citation omitted). The court of appeals therefore concluded that it was obligated to "consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements." *Id.* at 1209. The court of appeals added that its approach was "consistent with the Supreme Court's historic separation of recidivism and substantive crimes." *Ibid.* (citing *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998)).[6]

Applying the reasoning of *Corona-Sanchez* in the ACCA context, the district court determined that respondent's drug-trafficking offenses did not constitute "serious drug offense[s]" because the maximum term of imprisonment for first-time offenders was only five years, not ten years or more. J.A. 253. While recognizing that the sentencing provision applicable to repeat offenders "automatically double[d] the statutory maximum sentence" for such offenders, the court refused to consider that provision in deciding the relevant "maximum term of imprisonment," on the ground that "recidivism does

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[6] Judge Rymer, joined by three other judges, dissented in relevant part, reasoning that "the determinative sentence [under the INA] is the *actual sentence imposed*," and that, "if the statutory maximum is what matters," the relevant statutory maximum was the maximum for repeat offenders. *Corona-Sanchez*, 291 F.3d at 1217-1218. Judge Kozinski also dissented, reasoning that the relevant "offense" was "the distinct crime of theft by one who has previously been convicted of a predicate offense." *Id.* at 1219.

not relate to the commission of the offense." *Id.* at 253-254 (citation omitted). The district court therefore concluded that, because respondent's only qualifying predicate convictions were his two California burglary convictions, the ACCA was inapplicable. *Id.* at 254.

The district court determined that, based on a total offense level of 24 (reduced mostly because of the inapplicability of the ACCA) and a criminal history category of V, respondent's Guidelines sentencing range was 92 to 115 months of imprisonment. J.A. 241. The court sentenced respondent to 92 months of imprisonment, to be followed by three years of supervised release. J.A. 230, 232.

4. The court of appeals affirmed. J.A. 255-271. On appeal, respondent did not contest that his two California burglary convictions constituted qualifying predicate convictions, see J.A. 265 n.2, nor that he was subject to the higher sentence for repeat offenders on each of his three Washington drug-trafficking convictions, see Resp. C.A. Cross-Appellee Br. 4-12. As is relevant here, the court of appeals upheld the district court's decision not to apply the ACCA. J.A. 264-270.[7] The court of appeals held that "[t]he district court correctly applied our decision in *Corona-Sanchez*, concluding that it could consider only the five-year maximum penalty provided in the statute of conviction." J.A. 264-265. The court of appeals explained that "[t]he rationale articulated in *Corona-Sanchez* applies equally in this case," J.A. 266, and added that "[t]his rationale applies regardless of

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[7] Respondent also appealed his conviction, contending that the district court should have suppressed evidence from the search of the residence and that the evidence was insufficient to support his conviction. The court of appeals rejected respondent's contentions and affirmed the conviction. J.A. 259-264.

where the recidivist provision is located in the statutory framework," J.A. 267. Notwithstanding the fact that respondent had been subject to a ten-year maximum term as a repeat offender, therefore, the court of appeals held that "the district court properly concluded that it could consider only the five-year maximum penalty" provided for first-time offenders. J.A. 270.

SUMMARY OF ARGUMENT

A. The Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2000 & Supp. IV 2004), defines a "serious drug offense" as, *inter alia*, "an offense under State law" involving drug trafficking "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). For purposes of the ACCA, the relevant "maximum term of imprisonment" for a repeat offender is the maximum sentence prescribed by law for recidivists. As this Court has repeatedly noted, a recidivist enhancement constitutes a heightened penalty *for the underlying offense.* The ACCA, which is itself designed to impose more significant penalties on certain recidivists, is logically understood to recognize that a defendant's prior crimes may be more serious—*i.e.*, may have carried a higher sentence under state law—because the defendant was already a recidivist. Thus, a prior offense may have one maximum sentence for a first-time offender, but a higher one for a repeat offender. That is precisely what the Washington drug-trafficking statutes at issue in this case do. Those statutes prescribe maximum terms of imprisonment of five years for first-time offenders, but ten years for repeat offenders. Because respondent was a repeat offender subject to a ten-year maximum sentence on each of his convictions for drug-trafficking of-

fenses, his offenses constitute "serious drug offense[s]" for purposes of the ACCA.

Interpreting the ACCA to refer to the maximum term for recidivists when the defendant was a repeat offender avoids the anomalies that would result from interpreting the ACCA to point to only one maximum term, no matter what the status of the defendant or the actual maximum punishment provided by state law for that defendant. If the sole maximum term were the unenhanced term, repeat offenders whose prior sentencing exposure met the ten-year threshold would be equated with first-time offenders whose prior sentencing exposure did not. If the sole maximum term were the recidivist-enhanced term, all defendants would be subject to the higher statutory maximum term even if they were first-time offenders. It is difficult to impute to Congress an intention to have required either of those results. Rather, it is both more logical and more equitable to interpret the ACCA as acknowledging that, in States with higher maximum penalties for recidivists, first-time offenders have one "maximum term of imprisonment" while repeat offenders have another.

B. The court of appeals held that the "maximum term of imprisonment" for respondent's Washington drug-trafficking offenses was the maximum sentence to which a hypothetical first-time offender would have been subject. That interpretation, however, not only is inconsistent with the text of the ACCA, but would produce paradoxical results. It would lead to cases in which the "maximum term of imprisonment" for a repeat offender would be lower than the term of imprisonment that the offender actually received. A statute aimed at incapacitating and punishing serious serial offenders would not likely be intended to operate in such a fashion.

This Court's decision in *Taylor* v. *United States*, 495 U.S. 575 (1990), provides no support for the court of appeals' interpretation, because it deals with the discrete issue of whether a state-law offense is the type of offense that could serve as an ACCA predicate. Even under an approach analogous to the approach taken in *Taylor*, however, a sentencing court would be free to consider judicial records of convictions in determining whether a conviction qualifies under the ACCA. Use of such judicial records to determine the "maximum term of imprisonment" to which a defendant, as a recidivist, was exposed is thus fully consistent with *Taylor*. This Court's decisions in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), and *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), are also unavailing, because, as relevant here, they stand only for the proposition that, as a matter of constitutional law, recidivism need not be treated as an offense element. A necessary corollary of that proposition is that recidivism *can* raise the maximum sentence for an offense.

C. Respondent does not directly argue that, for purposes of the ACCA, the relevant "maximum term of imprisonment" for each of his convictions is the maximum sentence to which he was subject under Washington's then-existing mandatory sentencing guidelines scheme. Such an argument would in any event lack merit. While the text of the ACCA accommodates the possibility of alternative "maximum term[s] of imprisonment" for recidivists and non-recidivists, it does not contemplate a different "maximum term of imprisonment" for *every* offender based on a host of case-specific guidelines factors. Legislating in 1986, long before *Blakely* v. *Washington*, 542 U.S. 296 (2004), Congress spoke only of "a maximum term of imprisonment * * * prescribed by

law" for the offense, and that language in no way suggests that Congress had in mind the guidelines maximum particular to a given offender.

D. The court of appeals' interpretation of the phrase "maximum term of imprisonment" is inconsistent not only with the ACCA's text, but also with its underlying objectives. It would eliminate a significant category of predicate offenses from the ACCA's scope: *i.e.*, state-law (or federal) offenses committed by repeat offenders who were subject to ten-year maximum sentences solely because of their recidivist status. And it would potentially affect the interpretation of similarly worded provisions that attach consequences to the fact of a prior conviction for an offense punishable by imprisonment of a certain term. No sound basis justifies the court of appeals' reading, and its decision should accordingly be reversed.

ARGUMENT

RESPONDENT'S DRUG-TRAFFICKING OFFENSES QUALIFIED AS "SERIOUS DRUG OFFENSE[S]" UNDER THE ARMED CAREER CRIMINAL ACT OF 1984 BECAUSE, AS A RECIDIVIST, HE WAS EXPOSED TO A "MAXIMUM TERM OF IMPRISONMENT" OF TEN YEARS

Under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2000 & Supp. IV 2004), a person convicted of possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1), is subject to a 15-year minimum sentence if the person has three prior convictions for "violent felon[ies]" or "serious drug offense[s]." A "serious drug offense" is defined as, *inter alia*, "an offense under State law" involving drug trafficking "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). The

court of appeals erred in this case by holding that the relevant "maximum term of imprisonment" for the drug-trafficking offenses of which respondent was convicted was the maximum sentence to which a hypothetical first-time offender would have been subject, rather than the maximum sentence for repeat offenders that respondent actually faced. That holding cannot be squared with the text of the ACCA, or with this Court's decisions construing other language in the ACCA and similar language in other statutes.

A. Where State Law Prescribes Alternative Maximum Sentences Of Imprisonment For First-Time And Repeat Offenders, The Relevant "Maximum Term Of Imprisonment" For A Defendant Who Was A Recidivist Is The Maximum Sentence Prescribed For Repeat Offenders

There is no dispute in this case that, as a repeat offender, respondent was subject to a maximum term of imprisonment of ten years on each of his three convictions under Washington law for delivery of a Schedule III, IV, or V controlled substance. See Wash. Rev. Code §§ 69.50.401(a)(1)(ii)-(iv), 69.50.408(a) (1994). The only question is whether that maximum term of imprisonment is the relevant "maximum term of imprisonment" for purposes of the ACCA. The court of appeals e red by holding that it was not.

1. The provision of the ACCA at issue, 18 U.S.C. 924(e)(2)(A)(ii), defines a "serious drug offense" as, *inter alia*, "an offense under State law" involving drug trafficking "for which a maximum term of imprisonment of ten years or more is prescribed by law." As a threshold matter, the relevant "offense under State law" in this case is delivery of a Schedule III, IV, or V controlled substance, without regard to the offender's recidivist

status. As this Court has frequently noted, "[t]he definition of the elements of a criminal offense is entrusted to the legislature," particularly where the offense at issue is a "creature[] of statute." *Liparota* v. *United States*, 471 U.S. 419, 424 (1985). Although a legislature may treat recidivism as an offense element—as Congress did with regard to the offense of which respondent was convicted here, see 18 U.S.C. 922(g)(1) (treating the fact of a prior felony conviction as an element of the offense of possessing a firearm as a convicted felon)—recidivism is typically not an offense element when "the [underlying] conduct, in the absence of the recidivism, is *independently* unlawful." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 230 (1998) (emphasis added).

Recidivism is not an element of the Washington drug-trafficking offense of which respondent was convicted. The relevant statute provides that "it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance." Wash. Rev. Code § 69.50.401(a) (1994). The statute proceeds to establish different penalties depending on the type of controlled substance involved in the offense. *Id.* § 69.50.401(a)(1)(i)-(iv). Consistent with this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), the Supreme Court of Washington has held that the type of controlled substance is an offense element that must be submitted to the jury and proven beyond a reasonable doubt. See *State* v. *Goodman*, 83 P.3d 410, 415-416 (2004). Consistent with *Almendarez-Torres*, however, the Washington courts have not construed recidivism as an element of the drug-trafficking offense established by Section 69.50.401(a), and there is no basis here for departing from the general practice of treating recidivism as a sentencing factor.

Instead, the logical reading of the relevant state statutes is that they establish *alternative* maximum terms of imprisonment for the offense of delivery of a Schedule III, IV, or V controlled substance for two categories of offenders: *i.e.*, first-time offenders and repeat offenders. For first-time offenders, the maximum term of imprisonment is five years, see Wash. Rev. Code § 69.50.401(a)(ii)-(iv) (2004); for repeat offenders, the maximum term of imprisonment is doubled to ten years, see *id.* § 69.50.408(a). In respondent's case, it is the latter statute, and not the former, that "prescribe[d] [the] punishment for [his] offense." *United States* v. *Corona-Sanchez*, 291 F.3d 1201, 1218 (2002) (en banc) (Rymer, J., concurring in part and dissenting in part). Interpreting those statutes as establishing alternative maximum terms of imprisonment for the underlying offense is consistent with this Court's longstanding view that a recidivist enhancement constitutes a "stiffened penalty for the latest crime," *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948), rather than an additional penalty for the prior crime, see *Nichols* v. *United States*, 511 U.S. 738, 747 (1994).

2. In concluding that the applicable "maximum term of imprisonment" for the offense at issue here was the maximum term of imprisonment for first-time offenders, the court of appeals seemingly assumed that, under the ACCA, there can be only one "maximum term of imprisonment" for any given offense. See J.A. 266 (concluding that "the district court could consider only the maximum penalty as provided in the five-year statute of conviction, and not the maximum ten-year penalty resulting from the recidivism provision"). The text of the ACCA, however, belies the court of appeals' apparent premise. The ACCA does not define a "serious drug offense" as "an offense under State law * * * for which *the* maximum

term of imprisonment prescribed by law is ten years or more"; instead, it defines a "serious drug offense" as "an offense under State law * * * for which *a* maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii) (emphasis added). That language naturally accommodates the possibility that, for any given offense, the relevant statute may establish alternative maximum terms of imprisonment for recidivists and non-recidivists.

It is unsurprising, moreover, that Congress accommodated that possibility in the ACCA. After all, the ACCA is itself a statute that imposes stiffer penalties on certain recidivists, and it would be incongruous for Congress to ignore the possibility that prior offenses might have been deemed more serious (as measured by the applicable penalty) precisely because the defendant was at that time a repeat offender. Enhanced penalties for recidivists are a familiar and ubiquitous feature of the criminal justice system. See *Parke* v. *Raley*, 506 U.S. 20, 26-27 (1992) (noting that all 50 States and the federal government provide for recidivist enhancements). Congress had every reason to take such enhanced penalties into account in determining a defendant's maximum sentencing exposure on his prior offenses—and it is hard to imagine that Congress would have wanted to ignore state judgments that certain offenses were more serious when committed by repeat offenders.

This Court's decision in *United States* v. *LaBonte*, 520 U.S. 751 (1997), confirms that a statute may establish alternative maximum terms of imprisonment for recidivist and non-recidivists who commit a single offense—and that, for purposes of a federal statute referring to a "maximum" term, the relevant maximum may be the maximum for repeat offenders. In *LaBonte*, the

Court considered the meaning of a statute that directed the Sentencing Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants" who were career offenders. 28 U.S.C. 994(h). The Commission promulgated a guideline for career offenders and stated in the commentary that the "offense statutory maximum" was "the maximum term of imprisonment authorized for the offense of conviction * * *, not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." Guidelines § 4B1.1, comment. (n.2) (1995).

The Court held that the commentary to the guideline was inconsistent with the statute. *LaBonte*, 520 U.S. at 757-762. At the outset, the Court "assume[d] that in drafting this legislation, Congress said what it meant." *Id.* at 757. The Court noted that "the phrase 'maximum term authorized' should be construed as requiring the 'highest' or 'greatest' sentence allowed by statute." *Id.* at 758. The Court proceeded to reject the argument that the phrase "maximum term authorized" "refers only to the highest penalty authorized by the offense of conviction, excluding any statutory sentencing enhancements." *Ibid.* Citing 21 U.S.C. 841, which establishes a maximum term of imprisonment for certain drug-trafficking offenses of 20 years for first-time offenders but 30 years for repeat offenders, the Court reasoned that, "[w]here Congress has enacted a base penalty for first-time offenders * * * and an enhanced penalty for qualifying repeat offenders, the 'maximum term authorized' for the qualifying repeat offenders is the enhanced, not the base, term." *LaBonte*, 520 U.S. at 759.

As respondent notes (Br. in Opp. 13 n.5), the statute at issue in *LaBonte* refers to "the maximum term [of imprisonment] authorized for [certain] *categories of defendants*" (*i.e.*, career offenders), 28 U.S.C. 994(h) (emphasis added), whereas the ACCA refers to "a maximum term of imprisonment" *for the offense*, 18 U.S.C. 924(e)(2)(A)(ii). The critical lesson of *LaBonte*, however, is that a statute can be said to establish alternative "maximum" terms of imprisonment for a single offense, and that the relevant "maximum" term may depend on whether the defendant is a first-time or repeat offender. The reasoning of *LaBonte* thus supports the conclusion that, under the ACCA, the "maximum term of imprisonment" for a recidivist is the maximum to which he was actually subject as a repeat offender.

3. The court of appeals' apparent assumption that, under the ACCA, only one "maximum term of imprisonment" exists for any given offense would, if true, appear to lead to an anomaly that it is difficult to believe Congress would have intended. If there are two maximum penalties for a single offense (*e.g.*, five years for first-time offenders and ten years for repeat offenders), but the ACCA must identify a *single* maximum penalty prescribed by law for the offense, then it is hard to escape the conclusion that the true maximum penalty is the higher of the two. It would be literally true that the maximum penalty for the offense is ten years, even if a first-time offender could not receive a sentence longer than five years. That seems like an anomalous and unduly harsh result. But the alternative construction, under which a repeat offender who faces the possibility of a valid ten-year sentence would be treated as if he faced a maximum sentence of five years, is at least as anomalous and difficult to square with the statute. It would

make little sense to treat repeat offenders as having faced a "maximum" term that was *lower* than the term for which they were eligible.

Congress need not be deemed to have adopted either of those extreme alternatives. The language of the ACCA accommodates the possibility of alternative "maximum term[s] of imprisonment" for first-time and repeat offenders. Given the universal practice of enhancing sentences for recidivism and the ease of making findings concerning recidivist status, determining the maximum sentence for a recidivist by reference to that status is consistent with congressional intent. Because respondent was a repeat offender subject to a "maximum term of imprisonment" of ten years on each of his convictions for Washington drug-trafficking offenses, those offenses were "serious drug offense[s]" for purposes of the ACCA.

B. The Court Of Appeals Erred By Holding That The "Maximum Term Of Imprisonment" For The Offense For A Recidivist Is The Maximum Sentence To Which He Would Have Been Subject As A Non-Recidivist

The court of appeals held that the "maximum term of imprisonment" for respondent's Washington drug-trafficking offenses was the maximum term of imprisonment to which a hypothetical first-time offender would have been subject. J.A. 270. That interpretation cannot be reconciled with the ACCA's text, as discussed above. See pp. 14-20, *supra*. It would also produce highly anomalous results, with a defendant potentially serving a longer sentence than the one "prescribed by law" for purposes of ACCA. If there is only one maximum sentence for the offense that respondent committed, it is hard to escape the conclusion that it was the ten-year

maximum that respondent actually faced. No decision of this Court justifies the countertextual and incongruous consequences of the court of appeals' (and respondent's) approach.

1. The court of appeals' interpretation leads to the bizarre result that, for a repeat offender, the "maximum term of imprisonment" for his prior offense would sometimes be lower than the term of imprisonment that he actually received. This case does not present that precise anomaly, because, while respondent was subject to a ten-year maximum sentence on each of his Washington drug-trafficking convictions, he was actually sentenced to concurrent terms of 48 months of imprisonment on each conviction—less than the five-year maximum sentence for first-time offenders that would serve as the "maximum term of imprisonment" under the court of appeals' interpretation, much less the ten-year maximum that respondent actually (and undisputedly) faced. See J.A. 21, 47, 98.

The Ninth Circuit's earlier decision in *Corona-Sanchez*, however, illustrates the problem in its starkest form. That case involved the definition of "aggravated felony" under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, which includes "a theft offense * * * for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(G). In *Corona-Sanchez*, the defendant had been sentenced to two years of imprisonment for petty theft under California law, under a sentencing provision applicable to repeat offenders. 291 F.3d at 1208. Applying the approach that it would later follow in this case, however, the court of appeals held that the relevant maximum "term of imprisonment" for purposes of the INA was six months, notwithstanding the fact that the defendant's *actual* term of impris-

onment was two years, because six months was the maximum term of imprisonment for petty theft under California law for first-time offenders. *Id.* at 1208-1209.

It could perhaps be argued that, in *Corona-Sanchez*, only six months of the defendant's sentence was attributable to his "offense," and the remainder was attributable to his recidivism. Such an argument, however, would be irreconcilable with this Court's cases, which make clear that a recidivist enhancement constitutes a "stiffened penalty" *for the underlying offense*. *E.g.*, *Gryger*, 334 U.S. at 732. Indeed, if the defendant were being punished for his prior offense as such, the additional penalty would violate the Double Jeopardy Clause—an implication that *Gryger* recognized and rejected. *Ibid.* The practical consequence of such an argument, moreover, would be to leave the recidivist enhancement in a kind of legal limbo, at least for purposes of the ACCA, because that enhancement would constitute neither an element of the underlying offense nor a component of the term of imprisonment for that offense. A more natural understanding is that the recidivist enhancement is part of the punishment for the underlying offense. For a repeat offender, therefore, the "maximum term of imprisonment" for a given offense must be the highest sentence that the offender *could* have received—and, *a fortiori*, at least as high as the sentence that the offender *actually* received.[8]

2. Like the court of appeals in *Corona-Sanchez*, respondent principally relies (Br. in Opp. 13-14) on this

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[8] The determination whether a prior conviction qualifies under the ACCA unambiguously turns on the *potential* sentence prescribed by law for the offense. By contrast, in calculating a defendant's criminal history, the Guidelines take into account the *actual* sentence received by the defendant. See Guidelines §§ 4A1.1, 4A1.2(b)(1).

Court's decision in *Taylor* v. *United States*, 495 U.S. 575 (1990). That decision, however, is inapposite and provides no support for the court of appeals' interpretation.

In *Taylor*, this Court considered whether a state-law conviction qualified as a conviction for "burglary," one of the enumerated types of "violent felon[ies]" under the ACCA. The Court first held that, by referring to "burglary" in the ACCA, Congress did not intend to reach "whatever the State of the defendant's prior conviction defines as burglary," but instead "intended that some uniform definition of burglary be applied to all cases in which the Government seeks a[n] [ACCA] enhancement." 495 U.S. at 580. The Court then held that "Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States": *i.e.*, "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.* at 598. The Court concluded that, in determining whether a state-law conviction for burglary qualified as a conviction for "burglary" in that generic sense, a sentencing court should generally "look[] only to the statutory definition[] of the prior offense[], and not to the particular facts underlying th[at] conviction[]." *Id.* at 600.

Unlike *Taylor*, this case does not concern the threshold question of whether a state-law offense is the type of substantive offense that could serve as an ACCA predicate: respondent's convictions clearly were for "an offense under State law[] involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance," as the definition of "serious drug offense" in the ACCA requires. 18 U.S.C. 924(e)(2)(A)(ii). Instead, this case involves the distinct question of how to define the relevant "maximum term

of imprisonment" for such an offense. *Taylor* does not speak to that question; the notion of a "categorical" approach to a maximum sentence makes little sense; and the ACCA's text accommodates the possibility of multiple maximum terms of imprisonment for a single offense. A "categorical" approach thus provides no reason for ignoring recidivist enhancements.

In any event, even if *Taylor* had relevance here, a sentencing court would still be permitted to consider a defendant's recidivist status in order to determine the "maximum term of imprisonment" to which he was actually exposed. In *Taylor*, this Court did not hold that, where a State defined the offense of burglary more broadly than the generic offense (*e.g.*, by including places other than buildings), a conviction for that offense could *never* qualify as a conviction for "burglary" under the ACCA. Instead, the Court adopted a "modified" categorical approach, under which, where a defendant was convicted of a broader state-law burglary offense, "a sentencing court [may] go beyond the mere fact of conviction" to determine whether "[the] jury was actually required to find all the elements of generic burglary." *Taylor*, 495 U.S. at 602. Thus, where a state statute permitted a defendant to be convicted of burglary for stealing from a place other than a building, the government could still use that conviction for purposes of the ACCA if it could show, from the charging document and the jury instructions, that the defendant was actually convicted of stealing from a building (and thus that the defendant had committed burglary in the generic sense). *Ibid.* In *Shepard* v. *United States*, 544 U.S. 13 (2005), the Court extended that approach to the context of guilty pleas, holding that a sentencing court may consider "the terms of the charging document, the terms of

a plea agreement or transcript of [a plea] colloquy between judge and defendant * * *, or * * * some comparable judicial record," *id.* at 26, in determining whether the defendant actually pleaded guilty to, and was convicted of, generic burglary.

Just as a court can resort to judicial records under the "modified" categorical approach of *Taylor* and *Shepard* to determine whether a defendant was actually convicted of an ACCA predicate offense, so too could a court readily resort to judicial records in order to determine whether a defendant was actually subject to a higher "maximum term of imprisonment" as a repeat offender. In many cases, as was true here, it will be clear from the judgment of conviction that the defendant was subject to the maximum sentence for repeat offenders. See J.A. 16, 42, 93 (stating that the "[m]aximum term" of imprisonment for each conviction was "10 years"). In other cases, the transcript of the sentencing hearing will reflect that fact. And where a defendant pleaded guilty to the predicate offense, documents relating to the guilty plea (such as the plea agreement) may indicate that fact, just as they may indicate (for purposes of *Taylor*) whether the defendant pleaded guilty to an ACCA predicate offense.[9] All of those records are either identical or analogous to the types of judicial records whose consideration the Court sanctioned in *Taylor* and *Shepard*. Resorting to such judicial records to determine whether a defendant was exposed to a recidi-

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[9] Indeed, in this case, respondent expressly acknowledged in the plea statement for one of his convictions that "[t]he crime with which I am charged carries a maximum sentence of 10 years imprisonment." J.A. 28. In the plea statements for the other two convictions, the maximum sentence for the offense was omitted, apparently inadvertently. See J.A. 54, 105.

vist enhancement would therefore not trigger "collateral trials" and "evidentiary disputes" of the type that *Taylor* sought to prevent. *Shepard*, 544 U.S. at 23 & n.4.

Accordingly, "nothing in *Taylor* suggests" that a sentencing court is "require[d] * * * to separate the recidivist enhancement from the underlying offense" and thereby to ignore the fact that state law provides a higher maximum term of imprisonment for repeat offenders. *Corona-Sanchez*, 291 F.3d at 1217 (Rymer, J., concurring in part and dissenting in part). To the contrary, it is fully consistent with *Taylor* to permit sentencing courts to consider a defendant's recidivist status in determining the "maximum term of imprisonment" to which he was exposed.

3. Like the court of appeals in *Corona-Sanchez*, respondent also relies (Br. in Opp. 15-16) on this Court's decisions in *Almendarez-Torres* and *Apprendi*. Those decisions, however, similarly do not support the court of appeals' interpretation of the ACCA.

In *Almendarez-Torres*, the Court considered whether, in order to subject a defendant to a higher maximum sentence under the recidivist provision in 8 U.S.C. 1326(b)(2) (which applies to defendants who reenter the United States after deportation following conviction for an aggravated felony), the government must charge the fact of the earlier conviction in the indictment. The Court concluded, first, that Congress intended to treat recidivism in Section 1326(b)(2) as a sentencing factor, rather than an offense element, see *Almendarez-Torres*, 523 U.S. at 228-239, and second, that the Fifth Amendment did not *require* that recidivism be treated as an offense element (and therefore charged in the indictment), see *id.* at 239-247. In reaching the latter conclusion, the Court noted "[the] longstanding tradition" of

treating recidivism as "not relat[ing] to the commission of the offense," but "*go[ing] to the punishment only.*" *Id.* at 244. In *Apprendi*, the Court cited those statements from *Almendarez-Torres* in excluding recidivism from its otherwise categorical holding that, under the Fifth and Sixth Amendments, any fact that increases the otherwise-applicable statutory maximum sentence must be proven to the jury beyond a reasonable doubt. See 530 U.S. at 488.

Almendarez-Torres and *Apprendi* stand for the propositions that, as a matter of constitutional law, recidivism need not be treated as an offense element, and that a State may constitutionally choose to treat recidivism as a sentencing enhancement that a court can take into account without submission to the jury. Nothing in either opinion undermines the Court's longstanding view that, where a State treats recidivism as a sentencing enhancement rather than an offense element, the recidivist enhancement imposes a higher penalty *for the underlying offense.* See, *e.g.*, *Gryger*, 334 U.S. at 732. It necessarily follows that a repeat offender faces a greater "maximum term of imprisonment" for the offense than a first-time offender. *Almendarez-Torres* and *Apprendi* are therefore entirely consistent with the conclusion that, for purposes of the ACCA, the "maximum term of imprisonment" for a repeat offender is the maximum to which the defendant was actually subject as a recidivist—not the maximum sentence that would apply if the recidivist enhancement were disregarded.[10]

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[10] In the wake of this Court's decision in *Apprendi*, some members of the Court suggested that *Almendarez-Torres* should be overruled. See, *e.g.*, *Rangel-Reyes* v. *United States*, 126 S. Ct. 2873, 2874-2875 (2006) (Thomas, J., dissenting from denial of a writ of certiorari). As recently as last Term, however, the Court reaffirmed the holding of *Almen-*

C. The "Maximum Term Of Imprisonment" For An Offense Is Not The Maximum Sentence To Which A Particular Offender Was Subject Under A Mandatory State Sentencing Guidelines Scheme

Respondent does not directly argue that, for purposes of the ACCA, the relevant "maximum term of imprisonment" for each of his convictions is the maximum term to which he was subject under Washington's then-existing mandatory sentencing guidelines scheme: *i.e.*, 57 months of imprisonment. See J.A. 16, 42, 93. As respondent acknowledged in his brief in opposition (at 15 n.7), such an argument would be forfeited because respondent did not advance it in the courts below (and those courts accordingly did not consider it). To the extent that respondent instead argues (Br. in Opp. 15) that the government's interpretation is "internally inconsistent" because it recognizes statutory maximums for recidivists and non-recidivists as relevant "maximum

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darez-Torres, characterizing as "baseless" the argument that the fact of a prior conviction must be found by a jury. See *James* v. *United States*, 127 S. Ct. 1586, 1600 n.8 (2007). This case does not implicate the validity of *Almendarez-Torres*, because, even if *Almendarez-Torres* were overruled, it would not affect the interpretation of the ACCA. It is, after all, respondent who is attempting to draw support from *Almendarez-Torres*, and, if anything, overruling *Almendarez-Torres* would only strengthen the government's position here. If the Court were to hold that, where recidivism increases the otherwise-applicable statutory maximum penalty, it must be proved to the jury beyond a reasonable doubt, a State that wanted recidivism to be taken into account would be required to treat it as an offense element. Where a State did so, however, the relevant offense for ACCA purposes would be "drug trafficking by a recidivist," and the "maximum term of imprisonment" for that offense would necessarily be the maximum term to which a recidivist would be subject. See *Corona-Sanchez*, 291 F.3d at 1219 (Kozinski, J., dissenting).

term[s] of imprisonment," but not any lower guidelines maximum, such an argument lacks merit.

1. The text of the ACCA does not support the conclusion that the relevant "maximum term of imprisonment" is the maximum sentence to which a particular offender was subject under a mandatory state sentencing guidelines scheme. As is relevant here, the ACCA defines a "serious drug offense" as "an offense under State law * * * for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). While that language accommodates the possibility of alternative "maximum term[s] of imprisonment" prescribed by statute for recidivists and non-recidivists, it does not contemplate a different "maximum term of imprisonment" for *every* offender, depending on the particular facts about the offender's conduct developed at sentencing to determine the offender's guidelines sentence.

In construing similar language in 18 U.S.C. 922(g)(1)—which proscribes possession of a firearm by a person who has been convicted of a "crime punishable by imprisonment for a term exceeding one year"—the courts of appeals that have considered the issue have held that the relevant term of imprisonment is "the statutory maximum sentence for the offense, not the maximum sentence available in the particular case under the sentencing guidelines," on the ground that Section 922(g)(1) refers to "a crime's *potential* punishment." *United States* v. *Murillo*, 422 F.3d 1152, 1154-1155 (9th Cir. 2005), cert. denied, 547 U.S. 119 (2006); accord *United States* v. *Harp*, 406 F.3d 242, 246-247 (4th Cir.), cert. denied, 546 U.S. 919 (2005). The same reasoning is applicable to the ACCA; indeed, the Ninth Circuit has held that such reasoning applies "a fortiori," on the

ground that the statutory phrase "prescribed by law" "would appear to point more to the statute" establishing the maximum sentence for the offense. *United States* v. *Parry*, 479 F.3d 722, 726 (9th Cir.), cert. denied, No. 07-5270 (Oct. 1, 2007). Those cases support the conclusion that the relevant "maximum term of imprisonment" under the ACCA is the maximum for the offense, taking into account the offender's recidivist status but not all of the variations possible under a guidelines sentencing scheme.

2. *Blakely* v. *Washington*, 542 U.S. 296 (2004), is not to the contrary. In *Blakely*, the Court invalidated Washington State's mandatory sentencing guidelines scheme (the same scheme under which respondent was sentenced), holding that the scheme was unconstitutional because it mandated a sentencing range, lower than the statutory maximum for the relevant offense, that the judge could lawfully exceed only by finding an additional fact. *Id.* at 303. In so holding, the Court explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Ibid.* (emphasis omitted). The Court, however, did not purport to define the concept of a "maximum term of imprisonment" for purposes of the ACCA (or any other statute, for that matter); instead, it merely defined the concept for purposes of *Apprendi*'s constitutional (and procedural) rule, under which a fact (other than recidivism) that increases the otherwise-applicable "statutory maximum" may not be found by a judge, but must be submitted to the jury. See 530 U.S. at 488. Indeed, the Court's clarification that it was describing the statutory maximum "for *Ap-*

prendi purposes" underscores that the Court was using the phrase only in a specialized sense.

Congress passed the ACCA in its current form in 1986, long before *Blakely*. It did not with great prescience use the phrase "maximum term of imprisonment for *Apprendi* purposes," nor did it intend the phrase "maximum term of imprisonment" to be interpreted in that specialized manner. And there is no evidence that Congress believed that determinations under guidelines systems would control the "maximum term of imprisonment * * * prescribed by law" to which a defendant was exposed. Indeed, when Congress had just two years earlier provided for the promulgation of federal sentencing guidelines, it understood that the determination of guidelines ranges would not alter the maximum terms of imprisonment to which defendants were subject, which were fixed by statute; instead, the Sentencing Commission was charged, within two years of the effective date of the initial set of Guidelines, to "recommend to the Congress that it raise or lower * * * the maximum penalties[] of those offenses for which such an adjustment appears appropriate." 28 U.S.C. 994(r). As this Court recognized in *Mistretta* v. *United States*, 488 U.S. 361 (1989), the Commission's authority to promulgate the Guidelines did not "vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime." *Id.* at 396. To the extent that Congress in 1986 considered the issue in passing a statute that contained the phrase "maximum term of imprisonment * * * prescribed by law," it is thus untenable to suggest that Congress regarded sentencing guidelines systems as "prescrib[ing] by law" maximum penalties. While Congress was aware of state experimentation with guidelines systems, see S. Rep.

No. 225, 98th Cong., 1st Sess. 61-62 (1983), nothing indicates that Congress (or, for that matter, the States in question) regarded their guidelines systems as altering legislatively prescribed maximum sentences.

By contrast, the universal and well-established practice of varying maximum sentences because a defendant is a recidivist formed the very basis of the ACCA itself. A defendant sentenced for a violation of 18 U.S.C. 922(g)(1) faces a maximum sentence of ten years, see 18 U.S.C. 924(a)(2)—unless that defendant meets the recidivism criteria of the ACCA. Congress also was no doubt aware that statutes that impose higher maximum terms of imprisonment for recidivist defendants have a long pedigree and wide application in the States. See *Parke*, 506 U.S. at 26-27; *Oyler* v. *Boles*, 368 U.S. 448, 452 (1962); *Graham* v. *West Virginia*, 224 U.S. 616, 624 (1912); cf. *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979) ("It is always appropriate to assume that our elected representatives * * * know the law."). It is thus entirely logical to attribute to Congress the intention to respect, as the "maximum term of imprisonment * * * prescribed by law" for an ACCA predicate offense, the enhanced sentences provided for repeat offenders. No similar basis exists for imputing to Congress the intent to refer to individually varying sentences based on myriad factual determinations under federal or state guidelines systems.[11]

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[11] Resort to guidelines determinations as the determinant of maximum terms of imprisonment would also, at least before *Blakely*, have created a host of practical problems. Guidelines factors were typically not determined until the time of sentencing and would not always be ascertainable from readily available judicial documents long after the fact of sentencing in those cases. In addition, even when judges made determinations that are now understood to raise a "maximum" sentence

3. This Court's decision in *United States* v. *R.L.C.*, 503 U.S. 291 (1992), does not support the contrary conclusion, *i.e.*, that a defendant's "maximum" sentencing exposure for ACCA purposes must be determined by reference to state guidelines systems. That case involved a statute providing that the term of detention for a juvenile delinquent in the federal system may not exceed, *inter alia*, "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult." 18 U.S.C. 5037(c)(1)(B) and (2)(B)(ii) (1988). The Court held that, under that statute, the relevant "maximum term of imprisonment" was "the maximum length of sentence to which a similarly situated adult would be subject if convicted of the adult counterpart of the offense and sentenced under the statute requiring application of the Guidelines." *R.L.C.*, 503 U.S. at 306. In adopting the Guidelines maximum as the relevant "maximum," the Court reasoned that the language of the statute was ambiguous, *id.* at 297-298, but

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for *Blakely* purposes, judges typically were not *obligated* to increase sentences as a result. See, *e.g.*, *Blakely*, 542 U.S. at 305 n.8. A judge that exercised discretion not to enhance a sentence based on an aggravating factor under a state guidelines system may not have memorialized his finding of the aggravating factor or the ensuing consequences for the "maximum" sentence. Congress cannot have intended to require federal sentencing courts administering the ACCA to wade into a quagmire of such case-by-case assessments in order to decide whether a prior offense qualified for federal sentence enhancement. Cf. *Taylor*, 495 U.S. at 601 (noting the "daunting" "practical problems" that would result from a fact-based approach to determining whether a conviction qualifies, and concluding that, "[i]f Congress had meant to adopt an approach that would require the sentencing court to engage in an elaborate factfinding process regarding the defendant's prior offenses, surely this would have been mentioned somewhere in the legislative history").

that its construction was supported by the rule of lenity, *id.* at 305-306; *id.* at 307-311 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 312 (Thomas, J., concurring in part and concurring in the judgment). Four Justices concluded that the Court's conclusion was also supported by the legislative history. *Id.* at 298-305 (plurality opinion).[12]

The statute in *R.L.C.*, however, significantly differed from the statute at issue here, because, it expressly contemplated an offender-specific maximum sentence: *viz.*, the maximum sentence to which the *particular juvenile* would have been subject if he had been sentenced as an adult. The statute at issue here, by contrast, refers to "a maximum term of imprisonment" for the underlying *offense*, which, for the reasons described, cannot have been intended to subsume myriad guidelines determinations. Relatedly, the statute in *R.L.C.* dealt with punishments within the federal system and directed an offender-specific inquiry into the sentence that would have been imposed in that system. Here, by contrast, the ACCA seeks to make a federal sentence turn on offenses from all 50 States, and it would be far more surprising for Congress to have intended to incorporate all of the intricacies of those States' sentencing systems.

Moreover, as the plurality in *R.L.C.* noted, a contrary reading of the statute in *R.L.C.* would have meant that a sentencing court could have imposed a more severe sentence on a juvenile offender than would have been

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[12] The statute in *R.L.C.* has since been amended and now expressly provides that a juvenile's term of detention may not exceed, *inter alia*, "the maximum of the guideline range * * * applicable to an otherwise similarly situated adult defendant," unless the sentencing court finds an aggravating factor warranting an upward departure. 18 U.S.C. 5037(c)(1)(B), (2)(A)(ii) and (2)(B)(ii) (Supp. V 2005).

permitted for an adult offender under the then-mandatory federal Guidelines. See 503 U.S. at 305. Here, no anomaly results from excluding consideration of a prior offender's guidelines score when determining the "maximum term of imprisonment * * * prescribed by law." Indeed, the anomaly would be to exclude from sentence enhancement under the ACCA all but those defendants whose documented sentencing guidelines range met the ten-year threshold—even though the relevant state statutes provided a ten-year or greater penalty for the offense. Finally, no legislative history supports referring to a guidelines system to identify an ACCA offender's maximum sentence for a prior crime. Against that background, *R.L.C.* has no application here.

D. If Adopted By This Court, The Court Of Appeals' Interpretation Will Have Adverse Consequences For The Application Of ACCA And Other Statutes

The court of appeals' interpretation of the phrase "maximum term of imprisonment"—under which the "maximum term of imprisonment" for the offense for a repeat offender is the maximum sentence to which he would have been subject as a first-time offender—is inconsistent not only with the ACCA's text, but also with its underlying policy objectives. The ACCA was "designed to increase the participation of the Federal law enforcement system in efforts to curb armed, habitual drug traffickers and violent criminals." H.R. Rep. No. 849, 99th Cong., 2d Sess. 1 (1986). The court of appeals' interpretation, however, would exclude from the ACCA's scope recidivists who were indisputably subject to ten-year maximum sentences as repeat offenders for prior drug offenses under state laws, such as Washington's, that provide for lower maximum sentences for first-time

offenders.[13] It would also exclude from the ACCA's scope recidivists who were subject to similar ten-year maximum sentences as repeat offenders for prior drug offenses under *federal* law, insofar as the portion of the definition of "serious drug offense" that relates to prior federal offenses contains the same "maximum term of imprisonment" language as the portion of the definition that relates to prior state-law offenses. Compare 18 U.S.C. 924(e)(2)(A)(i), with 18 U.S.C. 924(e)(2)(A)(ii).[14] As the facts of this case amply demonstrate, the consequences of excluding those offenders from the ACCA's scope are potentially dramatic: here, respondent received only a 92-month sentence, barely half the *minimum* sentence that he would have received under the ACCA.

More broadly, the court of appeals' interpretation, if adopted by this Court, could have ramifications for the interpretation of other statutes in a range of different contexts. Numerous federal statutes impose more severe sanctions on individuals who have been convicted of "crimes punishable by imprisonment" for more than a specified term of years. Those statutes include the ACCA itself, 18 U.S.C. 924(e)(2)(B) (which defines a

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[13] In addition to Washington, at least 27 States have statutes defining drug-trafficking offenses with maximum sentences of less than ten years for first-time offenders, but ten years or more for repeat offenders. See App., *infra*, 3a-13a.

[14] While many provisions of the federal drug laws impose maximum sentences of ten years or more on first-time and repeat offenders alike, see, *e.g.*, 21 U.S.C. 841(b)(1)(A), (B) and (C), others, like the Washington statutes at issue here, impose a maximum sentence of ten years or more only on recidivists. See 21 U.S.C. 841(b)(1)(D) (imposing maximum sentence of five years for first-time offenders, but ten years for repeat offenders, for trafficking, *inter alia*, less than 50 kilograms of marijuana or less than 10 kilograms of hashish).

qualifying "violent felony" as a "crime punishable by imprisonment for a term exceeding one year"); the statute under which respondent was convicted here, 18 U.S.C. 922(g)(1) (which prohibits possession of a firearm by a person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year"); and the Controlled Substances Act, 21 U.S.C. 802(44) (which defines a "felony drug offense" as a drug offense "that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country"). Because the language in those statutes cannot meaningfully be distinguished from the language at issue here, the court of appeals' interpretation would seemingly narrow the scope of those statutes as well.

For the reasons stated above, there is no basis for adopting the court of appeals' cramped interpretation. The text of the ACCA, as well as common sense, dictates the conclusion that the "maximum term of imprisonment" for a recidivist is the maximum term to which he was actually subject as a repeat offender. The court of appeals therefore erred by holding that respondent was not subject to an enhanced sentence under the ACCA.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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APPENDIX A

1. Section 924(e) of Title 18 of the United States Code (2000 & Supp. IV 2004), provides:

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.) for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

APPENDIX B

STATE-LAW SERIOUS DRUG OFFENSES PUNISHABLE BY A MAXIMUM TERM OF IMPRISONMENT OF TEN YEARS OR MORE FOR RECIDIVISTS

Colorado: Colo. Rev. Stat. Ann. § 18-18-405(2)(a)(II)(A) (West 2006) (unlawful manufacturing, dispensing, selling, distributing, possessing or possessing with the intent to manufacture, dispense, sell, or distribute a Schedule III drug punishable by a maximum term of imprisonment of 6 years); Colo. Rev. Stat. Ann. § 18-405(2)(a)(II)(B) (second or subsequent offense punishable by a maximum term of imprisonment of 12 years).

Connecticut: Conn. Gen. Stat. Ann. § 21a-277(b) (West 2006) (illegal manufacture, distribution, or sale of non-narcotic controlled substance or hallucinogenic substance other than marijuana punishable by a term of imprisonment of not more than 7 years; second or subsequent offense punishable by a term of imprisonment of not more than 15 years).

Delaware: Del. Code Ann. tit. 16, § 4751(b) (2003) (unlawful manufacture, delivery, or possession with the intent to manufacture or deliver a Schedule III, IV, or V narcotic drug punishable by a maximum term of imprisonment of 5 years); Del. Code Ann. tit. 16, § 4752(a) (unlawful manufacture, delivery, or possession with the intent to manufacture or deliver a Schedule I, II, III, IV, or V non-narcotic drug punishable by a term of imprisonment of not more than 5 years); Del. Code Ann. tit. 16, § 4763(a)(1)(c) (for second or subsequent conviction un-

der Section 4751 (excepting heroin or any mixture containing heroin) or Section 4752, maximum term of imprisonment increased by not more than 5 years); Del. Code Ann. tit. 16, § 4763(a)(1)(d) (2003) (for second or subsequent conviction under Section 4751 involving heroin or any mixture containing heroin, maximum term of imprisonment increased by not more than 10 years); Del. Code Ann. tit. 11, § 4214(b) (2001) (for a third or subsequent conviction under Section 4751 or Section 4752, offender shall receive a sentence of life imprisonment).

Idaho: Idaho Code Ann. § 37-2732(a)(1)(B) (Supp. 2007) (unlawful manufacture, delivery, or possession with the intent to manufacture or deliver any Schedule I non-narcotic substance or a Schedule III controlled substance punishable by a term of imprisonment of not more than 5 years); Idaho Code Ann. § 37-2739(a) (2002) (for second or subsequent offense, term of imprisonment for up to twice the term otherwise authorized).

Illinois: 720 Ill. Comp. Stat. Ann. 570/401(d) (West 1997) (unlawful manufacture or delivery or possession with the intent to manufacture or deliver a Schedule I or II narcotic drug, LSD, or amphetamine punishable by a maximum term of imprisonment of 7 years); 720 Ill. Comp. Stat. Ann. 570/401(e)-(h) (unlawful manufacture or delivery or possession with the intent to manufacture or deliver a non-narcotic Schedule I or II substance or any other III, IV, or V controlled substance punishable by a maximum term of imprisonment of 5 years); 720 Ill. Comp. Stat. Ann. 570/408(a) (for second or subsequent offense, term of imprisonment of up to twice the term otherwise authorized); see 730 Ill. Comp. Stat. Ann. 5/5-8-1(a)(5).

Indiana: Ind. Code Ann. § 35-48-4-3(a) (LexisNexis 2004) (unlawful manufacture, delivery, or possession with the intent to manufacture or deliver a Schedule IV controlled substance punishable by a maximum term of imprisonment of 8 years with an advisory sentence of 4 years); Ind. Code Ann. § 35-50-2-8(h) (LexisNexis Supp. 2007) (offender with two prior, unrelated felony convictions may be sentenced to up to three times the advisory sentence for the offense); see Ind. Code Ann. § 35-50-2-6(a) (LexisNexis Supp. 2007).

Iowa: Iowa Code Ann. § 124.401(1)(d) (West 2007) (unlawful manufacture, delivery or possession with the intent to manufacture or deliver flunitrazepam or 50 kilograms or less of marijuana punishable by a maximum term of imprisonment of 5 years); Iowa Code Ann. § 124.411(1) (for second or subsequent offense, term of imprisonment not to exceed three times the term otherwise authorized); see Iowa Code Ann. § 902.9(5) (West 2003 & 2007 Supp).

Kentucky: Ky. Rev. Stat. Ann. § 218A.1421(3)(a) (LexisNexis 2007) (trafficking in 8 or more ounces but less than 5 pounds of marijuana punishable by maximum term of imprisonment of 5 years); Ky. Rev. Stat. Ann. § 218A.1421(3)(b) (for second or subsequent offense, maximum term of imprisonment of 10 years); see Ky. Rev. Stat. Ann. § 532.060(2)(c) and (d) (LexisNexis 1999 & Supp. 2007).

Louisiana: La. Rev. Stat. Ann. § 40:970(B) (West 2001) (unlawful producing, manufacturing, distributing or dispensing or possessing with intent to produce, manufacture, distribute, or dispense, a controlled dangerous substance classified in Schedule V punishable by a maxi-

mum term of imprisonment of 5 years); La. Rev. Stat. Ann. § 40:982(A) (for second or subsequent offense, maximum term of imprisonment doubled).

Maine: Me. Rev. Stat. Ann. tit. 17-A, § 1103(1-A)(B) (West 2001) (unlawful trafficking in a schedule X drug punishable by a maximum term of imprisonment of 5 years); Me. Rev. Stat. Ann. tit. 17-A, § 1105-A(1)(B)(3) (second or subsequent related to trafficking in schedule X drug punishable by a maximum term of imprisonment of 10 years); Me. Rev. Stat. Ann. tit. 17-A, § 1103(1-A)(E) (unlawful trafficking in marijuana in a quantity of more than one pound punishable by a maximum term of imprisonment of 5 years); Me. Rev. Stat. Ann. tit. 17-A, § 1105-A(1)(B)(4) (second or subsequent related to trafficking in marijuana in a quantity of more than one pound punishable by a maximum term of imprisonment of 10 years); see Me. Rev. Stat. Ann. tit. 17-A, § 4-A(3)(B) and (C).

Massachusetts: Mass. Ann. Laws ch. 94C, § 32B(a) (LexisNexis 2007 Supp.) (knowingly or intentionally manufacturing, distributing, dispensing, or possessing with the intent to manufacture, distribute, or dispense a Class C controlled substance punishable by term of imprisonment of not more than 5 years); Mass. Ann. Laws ch. 94C, § 32B(b) (second or subsequent conviction punishable by a term of imprisonment of not more than 10 years).

Michigan: Mich. Comp. Laws Ann. § 333.7401(2)(b)(ii) (West 2001 & Supp. 2007) (unlawful manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver a schedule 1, 2, or 3 substance (except marijuana) punishable by a term of imprison-

ment of not more than 7 years); Mich. Comp. Laws § 333.7401(2)(d)(ii) (unlawful manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver 5 kilograms or more but less than 45 kilograms of marijuana punishable by a term of imprisonment of not more than 7 years); Mich. Comp. Laws § 333.7413(2) (West 2001) (for second or subsequent conviction, offender may be imprisoned for a term not more than twice the term otherwise authorized).

Minnesota: Minn. Stat. Ann. § 152.025(1) (West 2005) (unlawful sale of mixture containing marijuana or Schedule IV substance punishable by a term of imprisonment of not more than 5 years); Minn. Stat. § 152.025(3) (second or subsequent offense punishable by a term of imprisonment of not more than 10 years).

Nebraska: Neb. Rev. Stat. Ann. § 28-416(2)(c) (LexisNexis 2003 & 2006 Supp.) (unlawful manufacturing, distributing, delivering, dispensing, or possessing with the intent to manufacture, distribute, deliver, or dispense a Schedule VI or V controlled substance punishable by a maximum term of imprisonment of 5 years); Neb. Rev. Stat. Ann. § 29-2221(1) (for offender with two prior felony convictions, maximum term of imprisonment of not more than 60 years); see Neb. Rev. Stat. Ann. § 28-105(1) (LexisNexis 2003).

New Hampshire: N.H. Rev. Stat. Ann. § 318-B:26(I)(c) (LexisNexis Supp. 2006) (manufacturing, selling, prescribing, administering, or transporting or possessing with the intent to sell, dispense, or compound less than one-half ounce of cocaine, less than 1 ounce of any schedule I or II narcotic, less than 1 ounce of methamphetamine, less than 1 gram of heroin or crack cocaine, 5

ounces or more of marijuana, less than 500 milligrams of flunitrazepam, or any other Schedule I-IV drug punishable by a maximum term of imprisonment of not more than 7 years for first offense and of not more than 15 years for second or subsequent offense).

New Jersey: N.J. Stat. Ann. § 2C:35-5(b)(3), (5), (9)(6), (13) (West 2005) (manufacturing, distributing, or dispensing or possessing with the intent to manufacture, distribute, or dispense less than one-half ounce of heroin or cocaine, less than 1 ounce of a Schedule I or II narcotic, less than one-half ounce of methamphetamine, or any other Schedule I-IV substance punishable by a maximum term of imprisonment of 5 years); N.J. Stat. Ann. § 2C:43-7(a)(4) (if one or more prior felony convictions, maximum sentence of 10 years of imprisonment for violations of Section 2C:35-5(b)(3), (5) and (9)(b)); see N.J. Stat. Ann. § 2C:43-6(a)(3).

New York: N.Y. Penal Law § 220.75 (McKinney 2007 Supp.) (unlawful manufacture of methamphetamine in the first degree punishable by a maximum term of imprisonment of 9 years); N.Y. Penal Law § 70.70(3)(b)(i) (for second or subsequent offense, maximum term of imprisonment of 12 years); see N.Y. Penal Law §§ 60.04, 70.70(2)(a)(i).

Oklahoma: Okla. Stat. Ann. tit. 63, § 2-401(B)(3) (West 2004 & 2007 Supp.) (distributing, dispensing, transporting with intent to distribute or dispense, or possessing with the intent to manufacture, distribute, or dispense, a Schedule V controlled dangerous substance punishable by a term of imprisonment for not more than 5 years); Okla. Stat. Ann. tit. 21, § 51.1(A)(3) (West 2002) (second

or subsequent offense punishable by imprisonment for a term not exceeding 10 years).

Pennsylvania: 35 Pa. Stat. Ann. § 780-113(a)(30), (f)(1.1) and (f)(2) (West 2003 & Supp. 2007) (manufacture, delivery, possession with intent to manufacture or deliver certain Schedule I, II, or III controlled substances (excluding narcotics, methamphetamine, and marijuana in excess of 1000 pounds) punishable by a term of imprisonment not exceeding 5 years); 35 Pa. Stat. Ann. § 780-115 (West 2003) (second or subsequent offense punishable by a term of imprisonment up to twice that otherwise authorized).

Rhode Island: R.I. Gen. Laws § 21-28-4.01(4)(ii) (Supp. 2006) (manufacture, distribution, possession with intent to manufacture or distribute a Schedule III(d) controlled substance (steroids or hormones) punishable by term of imprisonment of not more than 5 years); R.I. Gen. Laws § 21-28-4.11(A) (2003) (second offense punishable by a term of imprisonment up to twice the term authorized); R.I. Gen. Laws § 21-28-4.14(a) (third or subsequent offense punishable by a term of imprisonment up to three times the term authorized).

South Carolina: S.C. Code Ann. § 44-53-370(b)(2) (2002) (manufacturing, distributing, dispensing, delivering, or purchasing or possessing with the intent to manufacture, distribute, dispense, deliver, or purchase a Schedule I, II, or III substance (excepting a narcotic or LSD classified in Schedule I(b) or (c)) or flunitrazepam punishable by a term of imprisonment of not more than 5 years for first offense; for second offense, punishable by a term of imprisonment of not more than 10 years;

for third or subsequent offense, punishable for a term of imprisonment of not more than 20 years).

South Dakota: S.D. Codified Laws § 22-42-3 (West 2006) (unauthorized manufacturing, distributing, or dispensing or possessing with the intent to manufacture, distribute, or dispense a Schedule III controlled substance punishable by a maximum term of imprisonment of 5 years); S.D. Codified Laws § 22-42-4 (unauthorized manufacturing, distributing, or dispensing or possessing with the intent to manufacture, distribute, or dispense a Schedule IV controlled substance punishable by a maximum term of imprisonment of 2 years); S.D. Codified Laws § 22-7-7 (if offender has one or two prior felony convictions, principal felony is punished by changing class of principal felony to next class which is more severe; under this provision, a violation of Section 22-42-3 would be punished by a maximum term of imprisonment of 10 years); S.D. Codified Laws § 22-7-8 (if offender has three or more prior felony convictions including one or more conviction for a crime of violence, principal felony is punished by life imprisonment); see S.D. Codified Laws § 22-6-1.

Texas: Tex. Health & Safety Code Ann. § 481.112(b) (West 2003) (manufacturing, delivering or possessing with the intent to manufacture or deliver less than one gram of a substance in Penalty Group I is a felony punishable by up to two years in state jail); Tex. Health & Safety Code Ann. § 481.1121(b)(1) (manufacturing, delivering or possessing with the intent to manufacture or deliver fewer than 20 abuse units of a substance in Penalty Group I-A is a felony punishable by up to two years in state jail); Tex. Health & Safety Code Ann. § 481.113(b) (manufacturing, delivering or possessing

with the intent to manufacture or deliver less than one gram of a substance in Penalty Group 2 is a felony punishable by up to two years in state jail); Tex. Penal Code § 12.42 (a)(1) (West Supp. 2007) (third state jail felony punishable as a third-degree felony by not more than 10 years of imprisonment); see Tex. Penal Code § 12.35(a).

Utah: Utah Code Ann. § 58-37-8(1)(a)(i), (b)(ii) (Supp. 2007) (producing, manufacturing, dispensing or possessing with the intent to produce, manufacture, or dispense a Schedule III or IV substance or marijuana punishable by a term of imprisonment not to exceed 5 years for first conviction and by a term of imprisonment not more than 15 years for second or subsequent offense); see Utah Code Ann. § 76-3-203 (2003).

Vermont: Vt. Stat. Ann. tit. 18, § 4230(b)(2) (Supp. 2007) (knowing and unlawful dispensing or sale of one-half ounce or more of marijuana punishable by a term of imprisonment of not more than 5 years); Vt. Stat. Ann. tit. 18, § 4231(b)(1) (2002) (knowing and unlawful sale of cocaine punishable by a term of imprisonment of not more than 5 years); Vt. Stat. Ann. tit. 18, § 4232(b)(1) (Supp. 2007) (knowing and unlawful sale of LSD punishable by a term of imprisonment of not more than 5 years); Vt. Stat. Ann. tit. 18, § 4233(b)(1) (Supp. 2007) (knowing and unlawful sale of heroin punishable by a term of imprisonment of not more than 5 years); Vt. Stat. Ann. tit. 18, § 4234(b)(1) (2002) (knowing and unlawful sale of depressant, stimulant, or narcotic drug other than cocaine or heroin punishable by a term of imprisonment of not more than 5 years); Vt. Stat. Ann. tit. 18, § 4234a(b)(1) (knowing and unlawful sale of methamphetamine punishable by a term of imprisonment of not more than 5 years); Vt. Stat. Ann. tit. 18, § 4235(c)(1)

(2002) (knowing and unlawful sale of hallucinogenic drug other than LSD punishable by a term of imprisonment of not more than 5 years); Vt. Stat. Ann. tit. 18, § 4235a(b)(1) (2002) (knowing and unlawful sale of Ecstasy punishable by a term of imprisonment of not more than 5 years); Vt. Stat. Ann. tit. 18, § 4238 (2002) (second or subsequent offense punishable by a term of imprisonment up to twice of that authorized by the above sections).

West Virginia: W. Va. Code § 60A-4-401(a)(ii) (manufacture, delivery, or possession with the intent to manufacture or deliver a Schedule I, II, or III non-narcotic controlled substance punishable by a term of imprisonment of not more than 5 years); W. Va. Code § 60A-4-408(a) (second or subsequent offense punishable by a term of imprisonment of up to twice the term otherwise authorized).

Wisconsin: Wis. Stat. Ann. § 961.41(1)(b) (West 2007) (manufacture, distribution, or delivery of a Schedule I, II, or III non-narcotic drug a Class H felony punishable by a term of imprisonment not to exceed 6 years); Wis. Stat. Ann. § 961.41(1)(h)(2) (manufacture, distribution, or delivery of more than 200 grams but not more than 1000 grams of tetrahydrocannabinols a Class H felony punishable by a term of imprisonment not to exceed 6 years); Wis. Stat. Ann. § 961.41(1)(i) (manufacture, distribution, or delivery of a Schedule IV drug a Class H felony punishable by a term of imprisonment not to exceed 6 years); Wis. Stat. Ann. § 961.41(1m)(b) (possession with the intent to manufacture, distribute, or deliver a Schedule I, II, or III non-narcotic drug a Class H felony punishable by a term of imprisonment not to exceed 6 years); Wis. Stat. Ann. § 961.41(1m)(h)(2) (pos-

session with the intent to manufacture, distribute, or deliver more than 200 grams but not more than 1000 grams of tetrahydrocannabinols a Class H felony punishable by a term of imprisonment not to exceed 6 years); Wis. Stat. Ann. § 961.41(1m)(i) (possession with the intent to manufacture, distribute, or deliver a Schedule IV drug a Class H felony punishable by a term of imprisonment not to exceed 6 years); Wis. Stat. Ann. § 961.48(1)(b) (for second or subsequent offense, maximum term of imprisonment for Class H felony increased by not more than 4 years); see Wis. Stat. Ann. § 939.50(3)(h) (West 2005).